

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs December 12, 2006

**JOSEPH EDWARD SUGGS, III v. STATE OF TENNESSEE**

**Direct Appeal from the Criminal Court for Davidson County  
No. 99-B-1054 J. Randall Wyatt, Jr., Judge**

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**No. M2006-00485-CCA-R3-PC - Filed on June 20, 2007**

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The petitioner, Joseph Edward Suggs, III, pled guilty in the Davidson County Criminal Court to three counts of rape of a child, and he received a total effective sentence of seventy-five years. Subsequently, the petitioner filed a petition for post-conviction relief, alleging that his trial counsel were ineffective and that his guilty pleas were not knowingly and voluntarily entered. The post-conviction court denied the petition, and the petitioner appeals. Upon review of the record and the parties' briefs, we affirm the judgment of the post-conviction court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.**

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

David M. Hopkins, Nashville, Tennessee, for the appellant, Joseph Edward Suggs, III.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and James Sledge and Hugh Garrett, Assistant District Attorneys General, for the appellee, State of Tennessee.

**OPINION**

**I. Factual Background**

The petitioner was originally indicted on five counts of rape of a child and nine counts of aggravated sexual battery. The factual basis underlying the charges is as follows:

In January 1999, a videotape was given to police by a third party citizen. The videotape showed the [petitioner] engaging in multiple acts of child rape and aggravated sexual battery with his eight-year-old male cousin. A subsequent search of the [petitioner's]

home turned up extensive pornographic material and equipment for making pornographic material.

When police interviewed the [petitioner] about the videotape, the [petitioner] admitted he was the person committing the crimes in the video.

State v. Joseph E. Suggs, No. M1999-02136-CCA-R3-CD, 2000 WL 1521481, at \*1 (Tenn. Crim. App. at Nashville, Oct. 4, 2000). Ultimately, the petitioner pled guilty to three counts of rape of a child, a Class A felony, in exchange for the dismissal of the remaining charges. The plea agreement provided that the trial court would determine the sentences to be imposed. At the sentencing hearing, the trial court sentenced the appellant as a Range I standard offender to twenty-five years for each count with the sentences to be served consecutively for a total effective sentence of seventy-five years. The petitioner appealed his sentences, and this court affirmed the judgments of the trial court. Id.

Subsequently, the petitioner filed a petition for post-conviction relief, alleging that his trial counsel were ineffective and that his guilty pleas were not knowingly and voluntarily entered. Specifically, the petitioner alleged that counsel failed to obtain an evaluation determining that the petitioner was not a violent offender and that he was treatable and amenable to rehabilitation. The petitioner also complained that counsel failed to ensure that the psychosexual evaluation mandated by law was performed. The petitioner contended that counsel failed to adequately investigate the facts and law related to the petitioner's case and to adequately advise the petitioner regarding the applicable facts and law. Specifically, the petitioner claimed that the multiplicity of charges against him stemming from one videotaped incident violated principles against double jeopardy. Finally, the petitioner complained that counsel failed to properly prepare for the sentencing hearing and failed to thoroughly cross-examine a therapist who testified regarding the trauma to the victims.<sup>1</sup>

The petitioner testified on his own behalf at the post-conviction hearing. The petitioner acknowledged that he and trial counsel met at least once every two weeks from the time counsel was appointed prior to the preliminary hearing until the conclusion of the sentencing hearing. He said that counsel told him about the law and what he was facing; however, the petitioner maintained that counsel did not fully explain his options.

The petitioner said he was confused as to how the State could charge him with such a large number of offenses when the incident occurred on one day with one victim. The petitioner believed that he should have been charged with only a single count of rape of a child. The petitioner said that counsel never discussed double jeopardy with him, and counsel should have explored getting some of the counts against the petitioner dismissed on double jeopardy grounds.

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<sup>1</sup> The record reveals that the videotape showed the petitioner having sexual relations with two young boys, both of whom were the petitioner's cousins. However, all of the charges against the petitioner related to a single victim.

The State originally offered to allow the petitioner to plead guilty and receive a sentence of forty years. The petitioner felt that a sentence of forty years to be served at one hundred percent was effectively a “life sentence.” The petitioner said that he wanted to pay for what he had done while working on his problems in order to one day reenter society. Therefore, he rejected that plea offer. Counsel advised the petitioner that if he proceeded to trial he would likely receive a sentence much greater than forty years. The petitioner ultimately pled guilty to three counts of rape of a child and agreed to allow the trial court to determine his sentences. The petitioner said that “I wrestled with [the pleas] a great deal. I did not want to go to trial.” The petitioner asserted that he did not want to force the victim to testify because he loves the victim and did not want him to endure the trauma of a trial. At the post-conviction hearing, the petitioner acknowledged that he was aware at the time he pled guilty that he could receive as few as fifteen years or as many as seventy-five years.

The petitioner stated that at the time he entered his guilty pleas, he did not understand all of the repercussions of pleading guilty. The petitioner stated that he was unaware that the charges dismissed as a result of the guilty plea could be used against him at the sentencing hearing. He explained that he had learned that the charges “would be waived as far as like my sentencing was concerned because they were considered to be past behavior or behavior relating to this [offense].”

The petitioner said that he and counsel discussed the witnesses who would be presented at the petitioner’s sentencing hearing, namely the petitioner’s mother, sister, and friend. The petitioner believed that counsel would have the petitioner undergo an evaluation prior to the sentencing hearing “to shed some type of light as to the extent of the problem [he] has” as far as his amenability to treatment and his chances of reoffending.

The petitioner acknowledged that a therapist came to the jail over a couple of days to evaluate him. On the last day, the therapist told the petitioner that she had seen the videotape of the offenses. The petitioner was “very discouraged by that” because “anyone who has seen that tape has been affected by it.” At that point, the petitioner thought that the therapist’s ability to give an “honest appraisal” had been damaged by her viewing the tape.

Counsel informed the petitioner that he believed the therapist’s evaluation should not be presented at the sentencing hearing because the therapist had determined that the petitioner “had a problem,” namely his “attraction to children.” The petitioner conceded that he was “caught up in an addiction,” both in the past and at present, that “probably won’t go away.” Counsel told the petitioner that the therapist would not be a favorable witness. At the post-conviction hearing, the petitioner complained that the therapist had not addressed the issues he had wanted addressed by the evaluation. He believed that the issue was “my problem with children. It was more or less the extent of my problem . . . as far as . . . what is a predator and how – am I predatory?” The petitioner wanted the therapist to evaluate whether the petitioner had “violent tendencies” or if he “could take steps to control myself in order to . . . not infringe my actions or my thoughts on those that are around me.” At the post-conviction hearing, the petitioner testified, “I needed to have an – an evaluation that would help me in a sentencing hearing, not necessarily hers. . . . I wanted an evaluation I could use.”

The petitioner opined that there were “degrees” to which raping a child was a violent act; therefore, he thought a “proper therapist” would have found that he was not a violent offender.

At the post-conviction hearing, the petitioner complained that no psychological evaluation of his behavior was presented at the sentencing hearing, including the psychosexual evaluation mandated by law. The petitioner wanted an evaluation presented on his behalf. However, after the unfavorable evaluation, the petitioner felt that the opportunity was “lost to me.”

The petitioner maintained that, during the sentencing hearing, counsel did not adequately cross-examine the therapist who had evaluated the victims. The petitioner contended that the therapist had spoken in general terms as to the potential long-term effects of sexual abuse. According to the petitioner, the therapist said that the victims were experiencing problems sleeping, fear of their mother leaving, and fear of being left alone in the house. The petitioner told counsel that due to the fact that their mother was a drug addict, the victims had been experiencing those problems before the petitioner abused them. The petitioner said that the boys did not have a father figure in their lives, and he would have liked to have been that father figure. The petitioner wanted counsel to cross-examine the therapist to discover the extent the victims’ problems were attributable to the petitioner’s sexual abuse.

The petitioner complained that the admission of the videotape of the incident at the sentencing hearing was “a very damaging thing. The tape is bad. It really is.” The petitioner acknowledged that counsel had objected to the admission of the videotape, arguing that still photographs were available if necessary. The trial court had overruled the objection. The petitioner maintained that counsel should have objected more strenuously. The petitioner stated that he made the videotape because “I felt like that if I made a videotape rather than exposing my cousin to – to being abused by myself that I could probably use the videotape in place of my cousin.”

The petitioner said that he was concerned about the trial court watching the videotape because it was “misleading,” and he felt that there were elements of the videotape which he should have explained. However, counsel had advised the petitioner that he should not testify. At the post-conviction hearing, the petitioner argued that he should have testified at the sentencing hearing to explain certain scenes. For example, the petitioner stated that the videotape depicted him having anal sex with one of the victims. However, the petitioner maintained that he did not actually penetrate the victim; instead, he maintained that the scene was “staged.” The petitioner asserted that “there was no reaction from the child that would be typical of a child of that age, if that were to happen. . . . [I]f I had done what was seen on that tape, I would have hurt the child really bad.” The petitioner maintained that he had carefully planned the “staged” scenes. Regardless, the petitioner conceded that many of the acts depicted on the videotape had occurred and were not “staged.”

The petitioner’s post-conviction complaints focus primarily on the seventy-five-year sentence he received. He said, “I really kind of feel bad and I feel really kind of cheated, to a certain extent, that I was given a maximum of twenty-five years [on each count] and was given twenty-five years

back to back, to seventy-five.” He stated he refused the plea offer of forty years because he did not want to die in jail.

The petitioner’s trial counsel testified at the post-conviction hearing that he was appointed to represent the petitioner prior to the preliminary hearing, and co-counsel assisted with the case.<sup>2</sup> Counsel stated that he met with the petitioner a minimum of twenty times during the course of his representation. Counsel said the petitioner was intelligent and articulate and understood the seriousness of his situation.

Counsel recalled that Dr. Deborah Huntley, a doctor of psychology, evaluated the petitioner prior to the entry of his guilty pleas. Counsel knew of no reason that Dr. Huntley would have a bias against the petitioner. After the evaluation, Dr. Huntley told counsel that the petitioner had an average IQ, was “extremely narcissistic,” and was likely to reoffend. Dr. Huntley opined that the petitioner “didn’t think he caused any harm to these kids . . . narcissistic thinking . . . he didn’t recognize that these kids, you know, that he was exploiting them, that he was minimizing his behavior, that he did not have a whole lot of empathy for them.” Moreover, Dr. Huntley was concerned because the petitioner had a prior incident where he was charged and convicted as a result of other “problems” with children. Based upon the results of Dr. Huntley’s evaluation, counsel believed that calling her to testify at the sentencing hearing would be “extremely damaging” to the petitioner. Initially, counsel thought that an evaluation would be beneficial, but he explained that “it’s not the expert’s job to say what we want them to.” Counsel believed that no expert would have said the petitioner was “a non-violent individual.”

Counsel recalled that the State originally offered to allow the petitioner to plead guilty to a forty-year sentence. Counsel told the petitioner that the sentence offered “was a long time, but it was a light at the end of the tunnel.” Therefore, counsel advised the petitioner to seriously consider the offer, explaining that he believed the petitioner would get significantly more time if they proceeded to trial. Counsel cautioned the petitioner that he did not believe a trial would result in a better sentence. Nonetheless, the petitioner rejected the offer, fearing he would die in prison, and he decided to take a chance on a guilty plea without a sentencing recommendation. Counsel explained to the petitioner the sentences he was facing, carefully explaining the risk of consecutive sentencing.

Counsel stated that the central proof against the petitioner was the videotape of the crimes. He opined that at trial, the State might have called the victims to contradict the petitioner’s assertion that certain acts were staged. Moreover, counsel thought the videotape clearly reflected that certain acts were not staged. However, counsel acknowledged that one of the victims told police that the petitioner did not anally penetrate him.

Counsel stated that he could not clearly recall his cross-examination of the victims’ therapist. He said that he would not have curried favor with the court by attacking the therapist who said that the victims were damaged by the petitioner’s sexual abuse; therefore, he would have “carefully

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<sup>2</sup> Co-counsel did not testify at the post-conviction hearing.

tailored” his cross-examination. Counsel stated that after viewing the video, he did not know how an argument could be made that the victims were not experiencing problems from the abuse. Notably, counsel recalled that one victim had become sexually confused and began wearing nail polish and doing unusual things. Additionally, counsel maintained that he could not predict the therapist’s answers to certain questions and believed the safest course was to not ask those questions.

Counsel recalled that after discussion, the petitioner decided not to testify at the sentencing hearing. Instead, upon the advice of counsel, a written statement was prepared. Counsel feared the petitioner would minimize the crimes and maintain that the victims were not damaged by his abuse. Counsel opined that the petitioner’s claim that the anal intercourse was staged would not “score points” with the court, regardless of whether the statement was true.

Counsel said that an intern from his office prepared a brief on the issue of double jeopardy, but he could not recall if he discussed that issue with the petitioner. Although he may not have filed a written motion for a bill of particulars, counsel believed that he asked for one and was orally provided with it by the State. Counsel recalled that he watched the videotape several times and was able to match the charged acts of rape of a child with corresponding behavior on the videotape.

At the conclusion of the post-conviction hearing, the post-conviction court denied the petition, finding that the petitioner had not meet his burden of establishing by clear and convincing evidence that his counsel were ineffective or that his pleas were not knowingly and voluntarily entered. The petitioner now appeals that ruling.

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## **II. Analysis**

To be successful in his claim for post-conviction relief, the petitioner must prove all factual allegations contained in his post-conviction petition by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f) (2003). ““Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.”” State v. Holder, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999) (quoting Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.2 (Tenn. 1992)). Issues regarding the credibility of witnesses, the weight and value to be accorded their testimony, and the factual questions raised by the evidence adduced at trial are to be resolved by the post-conviction court as the trier of fact. See Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997). Therefore, we afford the post-conviction court’s findings of fact the weight of a jury verdict, with such findings being conclusive on appeal absent a showing that the evidence in the record preponderates against those findings. Id. at 578.

A claim of ineffective assistance of counsel is a mixed question of law and fact. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). We will review the post-conviction court’s findings of fact de novo with a presumption that those findings are correct. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). However, we will review the post-conviction court’s conclusions of law purely de novo. Id.

“To establish ineffective assistance of counsel, the petitioner bears the burden of proving both that counsel’s performance was deficient and that the deficiency prejudiced the defense.” Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). In evaluating whether the petitioner has met this burden, this court must determine whether counsel’s performance was within the range of competence required of attorneys in criminal cases. See Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To establish prejudice, the petitioner must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Further,

[b]ecause a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the [petitioner] makes an insufficient showing of one component.

Goad, 938 S.W.2d at 370 (citing Strickland, 466 U.S. at 697, 104 S. Ct. at 2069). Moreover, in the context of a guilty plea, “the petitioner must show ‘prejudice’ by demonstrating that, but for counsel’s errors, he would not have pleaded guilty but would have insisted upon going to trial.” Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998); see also Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985).

In determining whether a petitioner’s guilty plea was knowing and voluntary, this court must look at the totality of the circumstances. See State v. Turner, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995). “This court is bound by the post-conviction court’s findings unless the evidence preponderates otherwise.” Bates v. State, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997).

When a defendant enters a plea of guilty, certain constitutional rights are waived, including the privilege against self incrimination, the right to confront witnesses, and the right to a trial by jury. See Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712 (1969). Therefore, in order to comply with constitutional requirements, a guilty plea must be a “voluntary and intelligent choice among the alternative courses of action open to the defendant.” North Carolina v. Alford, 400 U.S. 25, 31, 91 S. Ct. 160, 164 (1970). In order to ensure that a defendant understands the constitutional rights being relinquished, the trial court must advise the defendant of the consequences of a guilty plea, and determine whether the defendant understands those consequences. See Boykin, 395 U.S. at 244, 89 S. Ct. at 1712.

To pass constitutional muster, a guilty plea must be made voluntarily, understandingly, and knowingly. Hicks, 983 S.W.2d at 246. To determine the voluntariness and intelligence behind a guilty plea, the court must look to various circumstantial factors, i.e.,

the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993).

In summary, the petitioner argues that counsel failed to adequately consult him regarding the outcome of the pleas. He maintains that his guilty pleas were entered after counsel advised him that at the sentencing hearing a psychological evaluation would be used in mitigation, and the petitioner would be allowed to testify to explain the contents of the videotape. Additionally, the petitioner contends that counsel did not adequately cross-examine the therapist who testified regarding the damage to the victims, specifically as to whether the petitioner caused the victims' psychological trauma or whether the victims were suffering trauma prior to the petitioner's abuse. Finally, the petitioner complains that counsel did not advise him that "the trial court would consider the total number of charges in the indictment in reaching its decision regarding his sentence" and that the petitioner "may have a double jeopardy defense to the multiple counts of the indictment because some of the depictions on the videotape were simulated and did not meet the definition of rape of a child."

In its order denying post-conviction relief, the post-conviction court found that counsel arranged for the petitioner to be evaluated by Dr. Huntley, who determined that the petitioner was likely to reoffend and "had no empathy for the victims." The court found that counsel's determination that a subsequent evaluation would likely yield the same result was "reasonable and justified." Further, the court found that "a subsequent evaluation would not have produced any material for mitigation . . . [and] a favorable evaluation would have had little effect on the Court's decision considering the reprehensible nature of the acts charged and the substantial weight of the evidence presented by the State."

The post-conviction court also found that counsel investigated the issue of double jeopardy by researching the issue and comparing the charges with the videotape. Thereafter, counsel determined that there was no merit to a double jeopardy challenge. The post-conviction court found that counsel "was under no obligation to litigate meritless issues." Additionally, the court found that counsel advised the petitioner against testifying at the sentencing hearing, and the petitioner decided not to testify. The court determined that counsel, after "consider[ing] the effect of vigorous cross examination of the victims' therapist[,] . . . did not believe he could attack her contention that the victims had developed social and psychological problems as a result of Petitioner's abuse." Counsel believed that such a cross-examination would be "more damaging than beneficial." The post-conviction court found that counsel, as a matter of strategy, presented all witnesses and evidence



available in mitigation. Accordingly, the post-conviction court determined that counsel was not ineffective and that the petitioner knowingly and voluntarily pled guilty.

Our review of the record reveals no evidence to preponderate against the court's findings. The petitioner did not present proof that a favorable evaluation could be obtained nor did he prove that such an evaluation would have served to mitigate his sentence. Counsel's decision regarding cross-examining of the victims' therapist and not submitting the results of the unfavorable evaluation as proof at the sentencing hearing were strategic decisions which this court will not second guess. Further, counsel determined that there was no viable double jeopardy claim, and the petitioner did not submit proof otherwise. The record reveals that the petitioner knew the charges he was facing and the sentences he could receive after pleading guilty. With this knowledge, the petitioner pled guilty to three counts of rape of a child to avoid a trial, hoping that he would receive the mercy of the sentencing court. Based upon the foregoing, we, like the post-conviction court, conclude that counsel was not ineffective and the petitioner knowingly and voluntarily pled guilty.

### **III. Conclusion**

Finding no error, we affirm the judgment of the post-conviction court.

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NORMA McGEE OGLE, JUDGE